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BEFORE THE
SURFACE TRANSPORTATION BOARD

FEE RECEIVED
APR 30 2010
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-290 (Sub- No. 311X)

FILED
APR 30 2010
SURFACE TRANSPORTATION BOARD

NORFOLK SOUTHERN RAILWAY COMPANY
PETITION FOR EXEMPTION
ABANDONMENT OF RAIL FREIGHT SERVICE OPERATION –
IN THE CITY OF BALTIMORE, MD AND BALTIMORE COUNTY, MARYLAND

ENTERED
Office of Proceedings
APR 30 2010
Part of
Public Record

PETITION TO REOPEN APRIL 5, 2010 DECISION

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1. James Riffin ("**Riffin**"), pursuant to 49 CFR 1152.25, herewith files this Petition To Reopen the Board's April 5, 2010 decision in the above entitled proceeding, and for reasons states:

2. On April 5, 2010, the Board in the above entitled proceeding, served a decision granting Norfolk Southern Railway Company ("**NSR**") authority to abandon its operating rights on the Cockeysville Industrial Track ("**CIT**"), and exempted the proceeding from the Offer of Financial Assistance ("**OFA**") procedures. The Board's Order stated the exemptions would become effective on **May 5, 2010**. The Order further stated that petitions to stay must be filed by **April 20, 2010**, and petitions to reopen must be filed by **April 30, 2010.**

3. A petition to reopen must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances. 49 CFR 1152.25 (e)(4).

SUMMARY OF ARGUMENT

4. The Board denied Zandra Rudo and Lois Lowe their Due Process Right to present evidence of shipper interest. It was material error for the STB to hold that Riffin is not a shipper in 2009. Norfolk Southern failed to identify the end of the Line of Railroad its seeks to abandon with sufficient particularity. Pleadings of Norfolk Southern and the Maryland Transit Administration ("**MTA**") call into question what was conveyed by the Final System Plan, resolution of which may only be made by the Special Court. The Board's Decision leaves a substantial 'stranded segment:' The Cockeysville Industrial Park Branch Line. The MTA's pleadings do not constitute 'substantial evidence,' since the pleadings are not accompanied by a verified statement. Exempting the proceeding from the OFA procedures was contrary to statute and Congressional intent. No "Post EA" was ever served on a party nor put on the STB's web site.

BACKGROUND INFORMATION

5. On April 5, 2010, the Board granted Norfolk Southern Railway Company ("**NSR**") authority to abandon that portion of the Cockeysville Industrial Track that lies between Mileposts UU 1.0 and UU 15.44, and further exempted the proceeding from the Offer of Financial Assistance Procedures ("**OFA**") ("**Decision**").

ASSERTIONS OF NSR

6. In its Petition, NSR asserted the following:

A. "The Maryland Transit Administration (MTA) owns the entire Line over which NSR will abandon the freight service operating rights and operations." Petition at 7.

B. The "MTA's 1990 acquisition of the CIT did not require agency (ICC) authorization under 49 U.S.C. §10901 and that MTA did not acquire a common carrier obligation by virtue of its acquisition of the CIT in 1990 or transactions it has taken since that time." Petition at 8.

C. "MTA currently operates passenger rail transit service over most of the Line. MTA's passenger rail transit operation over the Line extends to the wye track just north of Warren Road, **near Milepost UU-13**, at which the Hunt Valley Extension springs from the CIT main line." Petition at 8-9. Emphasis added.

D. "NSR freight service operations over the Line ceased in April 2005, active shippers on the Line at that time have been using alternative transportation services for over four years and have agreed with MTA to continue using such services, no railroad customer who has received service over the Line has filed a formal complaint concerning lack of service on the Line, there has been no reasonable request for rail freight service over the Line by or on behalf of an actual railroad customer located along the Line in the period since April 2005 and the Line is now heavily used for passenger rail transit operations. There is no reasonable prospect that a sufficient volume of traffic could be attracted and definitely committed to use restored rail service over the Line for NSR (or any railroad freight service operator) to be able to operate freight service over the Line at a profit. Thus, there is no need for future rail freight service over the Line." Petition at 13-14.

E. "Whether or not the title to any of the property on which the Line is located is subject to any reversionary interest is not relevant in this proceeding. The Line's right-of-way is already owned or lawfully used under easements for railroad purposes by MDOT for MTA's passenger rail transit operations." Petition at 17.

F. "NSR states that if OFA information concerning ownership or valuation of the Line's right-of-way or other property was requested, NSR could only respond that MTA, not NSR, owns the right-of-way, including all real estate held in fee, and the track and materials that comprise the Line. NSR can not convey the Line's right-of-way or material to an offeror. Therefore, NSR can not provide a minimum purchase price for the Line or the supporting valuation information." Petition at 29.

G. "NSR can not estimate the value of the freight operating easement, freight service operating rights and freight service operations on the Line or the compensation that should be **paid to MTA** for such easement, rights and operations by a third party." Petition at 30. Emphasis added.

H. "NSR does not maintain the Line." Petition at 30.

I. "NSR surmises that only minor rehabilitation of the Line and restoration and reconnection of switches would be required to perform freight service over the Line and to ancillary tracks ... ." Petition at 30.

7. NSR requested that the Board "exempt the abandonment of NSR's freight service operating rights and its freight service operations over the Line from the provisions of 49 U.S.C. §10904." Petition at 32.

8. In support of its request to exempt the proceeding from the OFA procedures, NSR asserted the following:

A. No traffic has moved over the Line since April, 2005. Petition at 32.

B. "[T]there has not been a reasonable request for rail service from a customer on the Line since that date [April, 2005]." Petition at 32.

C. "Moreover, there is no reasonable prospect that any definite amount of freight traffic would move over the Line in the future, much less a sufficient amount of definite future freight traffic to operate freight service over the Line at a profit." P. at 33.

D. "There has been no freight service over the Line for well over four years, former customers have committed to and agreed to use alternative transportation services, no other definite potential freight service customers have committed to or are likely to commit to use of rail service over the Line in volumes and at rates or revenues sufficient to operate the service profitably. Thus, there is no demand or need for future freight service over the Line." Petition at 35-36.

ASSERTIONS OF THE MTA

9. On **January 25, 2010,** the Maryland Transit Administration ("**MTA**") filed a Reply of the MTA in Support of Petition for Exemption ("**MTA Reply**"). In its MTA Reply, the MTA corroborated the assertions made by NSR regarding ownership / use of the Line for commuter rail service / and MTA's double-tracking and maintenance of the Line. On p. 4 of the MTA Reply, Counsel for the MTA made the following corroborated assertions:

A. "Scheduled light rail service operates between 6:00 am and 11:00 pm, Monday-Saturday, and between 11:00 am and 7:00 pm on Sundays;"

B. "In 2008, the latest year for which data are publicly available, light rail weekday boardings averaged 25,754 passengers for regularly scheduled service."

10. Counsel for the MTA made the following **uncorroborated** statements: "[I]ncreased demand for light rail service compelled MTA to take steps to (1) increase capacity on the Line for light rail traffic and (2) **reduce actual and potential temporal conflicts between freight traffic and light rail traffic**. Accordingly, MTA double-tracked the entire segment of the Line from North Avenue [Milepost 0.5] to just north of Warren Road in Baltimore County, [Milepost 13.0] where the light rail line leaves the subject right-of-way, to allow for simultaneous two-way traffic over the Line." MTA Reply at 3. "[L]ight rail trains also need access to the track during non-service hours for staging and other purposes." MTA Reply at 4. (Emphasis added.)

11. On p. 2 of the MTA Reply, **Counsel** for the MTA also made three bald allegations that were **unsupported, unsubstantiated, and unverified,** which statements formed the **sole basis** for the Board's decision to exempt the proceeding from the OFA procedures, in contravention of the Administrative Procedures Act, 5 U.S.C. 556:

A. "MTA asserts that the abandonment and associated exemptions are critical to ensure the future safety and success of the light rail transit system it operates over the Line." Op. at 2-3. MTA Reply at 2.

B. "MTA states that there has been no freight traffic on the Line, or any reasonable request for freight rail service, since April 2005, and that there is no credible or reasonable prospect of future demand for such service." Op. at 3. MTA Reply at 2.

C. "In addition, MTA asserts that, as demand for freight rail services has decreased over the Line, demand for passenger light rail service on the Line has increased, thus compelling MTA to double-track the entire Line while working to reduce actual and potential conflicts with freight traffic." Op. at 3. MTA Reply at 3.

12. "MTA asks the Board to grant NSR's petition for exemption, based on the lack of demand for freight rail service and the valid and compelling public purpose the Line is serving." Op. at 3. MTA Reply at 17.

ASSERTIONS OF RIFFIN

13. The Board acknowledged the following assertions made by Riffin, all of which were **supported by sworn affidavits**:

A. "Riffin disputes NSR's claim that future freight traffic would not generate sufficient revenue to cover the costs of resuming freight service on the Line." Op. at 3.

B. "Riffin also claims that the reason there has been no freight rail traffic over the Line since 2005 is because MTA removed most the the track infrastructure and effectively took the Line out of service in April 2005 in order to facilitate its double-tracking project." Op. at 3.

C. "Riffin argues that his acquisition of NSR's freight operating rights would not interfere with MTA's current or planned transit services." Op. at 3.

D. "Riffin contends that he has made reasonable requests for freight service, but that NSR improperly denied them as unreasonable." Op. at 3.

E. "Riffin also states that a number of other shippers desire freight rail service in Cockeysville. In support of his claims, Riffin submits as confidential information a listing of what he describes as potential shippers and their projected need for freight rail service in Cockeysville, in addition to other information." Op. at 3.

F. "Riffin states that, without freight rail service on the Line, the proposed incinerator will result in the transport by motor carrier of 365,000 tons of MSW to Harford County, thus doubling the number of trucks on Route 152 to 27,000 per year." Op. at 3-4.

G. "Riffin further claims to have submitted a proposal for the transportation of an average of 13 rail cars per day of MSW from Cockeysville to the Harford County incinerator over the Line, between the hours of midnight and 5 am." Op. at 4.

FINDINGS OF STB

14. The STB made the following findings regarding NSR's request for authority to **abandon its operating rights** on the Line:

A. "Here, the record evidence does not show any current need, or any credible, nonspeculative future need, for freight service on the line." Op. at 4.

B. "There are no **current** freight railroad customers using the Line. Fn 3: The Board previously has assessed Riffin's claim that NSR failed to serve him and has determined that Riffin is not a shipper on the CIT. *Maryland Transit Administration – Petition for Declaratory Order,* STB Finance Docket No. 34975 (STB served **Sept. 19, 2008**). Riffin's restatement of the same allegations here does not warrant revisiting that determination." Op. at 4. (Emphasis added.)

C. "The three former shippers on the Line have shifted their traffic to alternate transportation services." Op. at 4.

D. "Riffin's forecasts for potential freight rail traffic on the CIT are too speculative to be given any significant weight. In *Union Pacific Railroad Company – **Discontinuance** – in Utah County, Utah,* STB Docket No. AB-33 (Sub-No. 209), slip op. at 2-3 (STB served Jan. 2, 2008) (*Utah County*), the Board declined to consider a potential shipper's traffic projections because that party had not taken the basic step of **contacting the carrier about rates and terms of service**, nor had it provided contracts **or otherwise demonstrated that the traffic would be likely in**

the coming year. Here, Riffin's showing is even weaker: he has failed to submit any verified statements or other evidence from shippers requesting freight rail service or demonstrating a need for such service in the future. Rather, Riffin's only evidence of potential traffic consists of his unsubstantiated statements. We find this evidence to be insufficient." Op. at 4. (Emphasis added.)

E. "In short, as was the case in *Utah County*, there simply is no evidence before us in this case of any commitment or **affirmative acts by actual or potential shippers** to secure rail service over the Line. As a result, we find that the potential future traffic claimed by Riffin is too speculative to be entitled to much weight." Op. at 5. (Emphasis added.)

15. The STB made the following findings regarding NSR's request for authority **to exempt the proceeding from the OFA procedures**:

A. "Here, NSR has established that the Line is currently used for a valid public purpose by MTA, as a passenger rail transit line." Op. at 6.

B. "MTA has asserted on this record that the abandonment of freight rail service is critical to ensuring the future safety and success of the light rail transit system MTA operates over the Line." Op. at 6.

C. "MTA explains that it has worked to reduce actual and potential conflicts with freight traffic to ensure that the increased demand for light rail service on the Line is safely met." Op. at 6.

D. "The Board has received **no request from a** former shipper or **potential shipper** indicating a commercial need for freight rail service over the Line." Op. at 6. (Emphasis added.)

E. "However, given the short distances involved, the fact that the MSW movements **necessarily originate on trucks**, and the fact that **a rail interchange would be needed to complete the delivery of the MSW to the potential incinerator**, which if located on a rail line, **would be on a different rail line**, we have serious questions about the **feasibility of an operation transloading the MSW from trucks to rail here.**" (Emphasis added.)

F. "Given the testimony of MTA and Baltimore County, we require a stronger showing than Riffin has made that rail service to the proposed incinerator would serve a real public need and that **such service would not compromise the safety of the continued use of the tracks for public transit, an important consideration here.**" (Emphasis added.)

G. "More importantly, in that case [*Norfolk Southern Railway Company – Adverse Abandonment – St. Joseph County, IN*, STB Docket No. AB-29- (Sub-No. 286) (STB served Feb. 14, 2008)], the Board was persuaded that there was a real potential for rail service: Notre Dame University, a former shipper of coal on the line, continued to receive 80,000 tons of coal annually by motor carrier and was expected to increase its use to 100,000 tons annually in the near future; coal is a commodity that can be moved more efficiently by rail than by truck; and although Notre Dame **had withdrawn its initial support for a plan to reactivate the line, it LATER** indicated that it **MIGHT CONSIDER** resuming using rail service for its coal deliveries. The record here reveals no similar evidence of a potential demand for the renewal of freight rail service." Op. at 7. (Emphasis added.)

H. "Riffin also quotes a lengthy passage from *Norfolk Southern Railway Company – Abandonment Exemption – In Orange County, NY*, STB Docket No. AB-290 (Sub-No. 283X) (STB served May 2, 2007) (*Orange County*) to suggest that his mere expression of interest in providing rail service on the Line suffices to prevent the Board from granting an OFA exemption. In quoting *Orange County*, Riffin omits the Board's finding that, in that case, 'the petition for abandonment is not tied to a public project.' Here, in contrast, NSR's petition *is* tied to a public project, MTA's light rail commuter passenger system." Op. at 7-8. Emphasis in original.

I. "Applying OFA provisions in this instance is not necessary to carry out the rail transportation policy. Allowing the abandonment exemption to become effective expeditiously, without first being subject to these provisions, will minimize the need for Federal regulatory control over the rail transportation system, expedite the regulatory decision, and reduce regulatory barriers to exit [49 U.S.C. 10101(2) and (7)]. Regulation is not necessary to protect shippers from an abuse of market power, because there are no current shippers on the Line and no potential shippers have objected to the exemption from the OFA process."

ARGUMENT

DENIAL OF DUE PROCESS

16. Zandra Rudo ("**Rudo**") and Lois Lowe ("**Lowe**") both filed a Notice to Participate as a Party of Record on January 5, 2010 and personally signed their Notice to Participate. NSR moved to strike their notices, arguing that the notices were "from persons unidentified and unidentifiable." NSR January 14, 2010 Motion to Strike, p. 4. In a decision served on March 22, 2010, the STB struck Rudo's and Lowe's Notices to Participate, stating:

"Of those individuals purportedly seeking to participate, only Riffin and now Eric Strohmeyer have submitted sufficient information to be listed as parties of record. Accordingly, NSR's motion to strike the participation Notice is granted as to all of the named individuals except for Riffin." Op. at 3.

17. Following the Board's March 22, 2010 Decision, on March 23, 2010, Riffin and Carl Delmont, and on March 24, 2010, Rudo and Lowe, spoke with Jo Dettmer, the STB's Deputy Director of Proceedings.[1] In these telephone conversations, the parties offered to provide the STB with a photocopy of their Maryland Driver's Licenses, to establish their identities. Mr. Dettmer explicitly stated that that was not necessary, for in his opinion, they were 'identified.' Not willing to trust Mr. Dettmer's oral assurances, Rudo, Lowe and Delmont all sent Motions for Protective Orders and photocopies of their driver's licenses to the STB under seal. As it turned out, it was good they ignored Mr. Dettmer's assurances and sent photocopies of their driver's licenses to the STB, since the STB did not acknowledge that they were 'identified,' and became parties, until March 26, 2010, the date photocopies of their driver's licenses arrived at the STB.

18. On page 5 of its March 22, 2010 Decision, the STB made the following statements:

"In the interest of compiling a full and complete record, the Comments, as amended and supplemented, will be accepted into the record **solely on behalf of Riffin.** However, Riffin is advised that he has had a full and fair opportunity to respond to the NSR petition for exemption. ... **Accordingly, any further submissions** by Riffin **to supplement the record will be looked upon with disfavor by the Board.**" (Emphasis added.)

19. It was not until the Board served its April 5, 2010 Decision that Rudo and Lowe were informed that they had the right to participate as parties of record. Unfortunately, their right to participate was purely illusory, and lasted at most only a fraction of a nanosecond (The time it takes a computer to move from p. 2 of the STB's April 5, 2010 Decision, where the right to participate was granted, to p. 8 of the April 5 Decision, where the STB granted NSR's request to exempt the proceeding from the OFA procedures.)

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[1] Riffin was in the room when these telephone conversations occurred, and thus has personal, first-hand knowledge about what was said. (Riffin's statements in this paragraph are not 'hearsay.')

20. This failure to permit Rudo and Lowe to actually participate meaningfully, and to submit evidence to the STB regarding their interest in preserving the CIT for their freight rail needs, and the interest of six other shippers in freight rail service, denied Rudo and Lowe their Due Process Right to participate in the proceeding. The STB is fully aware that Ms. Lowe is the Executive Secretary of the Cockeysville Rail Line Shippers Coalition, since Ms. Lowe submitted letters from Cockeysville Shippers to the STB on February 22, 2006, in AB 290 (Sub No. 237X), *Petition for Exemption – Norfolk Southern Railway Company – Cockeysville Line, Baltimore City and Coutnty, Maryland.* [A copy of Ms. Lowe's February 22, 2006 cover letter is appended hereto for the STB's convenience.] Since the STB and NSR **were both fully aware of who Ms. Lowe was,** it was an **egregious violation** of her Due Process Rights to strike her Notice of Intent to Participate as a Party of Record, and to abrogate her Due Process Right to submit evidence of shipper interest in the CIT. In a separate filing, Ms. Lowe will voice her own displeasure concerning the STB's wanton, arbitrary, capricious, unreasonable and unlawful denial of her Due Process Right to meaningfully participate in this proceeding.

21. In November, 2009, in anticipation of NSR's Petition to abandon the CIT, shippers who had executed letters of interest / opposition to loss of freight rail service in 2006, executed new letters of interest / opposition to loss of freight rail service. Since Ms. Lowe is the Executive Secretary of the Cockeysville Rail Line Shippers Coalition, she, rather than Riffin, is the appropriate party to submit to the STB under seal, copies of letters from shippers expressing a desire for rail service in Cockeysville. That is the reason why Riffin did not include these shipper's letters in his Protective Order. Since the STB expressly denied Ms. Lowe the right to participate as a party in its March 22, 2010 decision, and since the STB expressly stated it would look upon any additional filings by Riffin "with disfavor," Riffin complied with the STB's 'order' not to file any additional material, and Ms. Lowe waited until the STB granted her authority to participate. But at the moment the STB granted Ms. Lowe authority to participate, it also summarily took away her right to participate, by rendering its decision exempting the proceeding from the OFA procedures.

22. Riffin will note that since the STB gave no weight to the shippers letters previously filed by Riffin, due to the lack of verification, the shippers have reexecuted **verified** letters opposing loss of rail service on the CIT, indicating their desire for rail service, and further indicating the commodities they would ship and the estimated number of rail cars per year they would ship. The total number of rail cars these eight shippers would ship, 260, is 70 more than the 190 cars NSR stated that it shipped **at a profit**. See AB 290 Sub No. 237X, *op. cit.*

IT WAS MATERIAL ERROR TO HOLD THAT RIFFIN IS NOT A SHIPPER

23. On p.4 of the April 5 Decision, the STB summarily dismissed Riffin's claim that he is a shipper on the CIT, stating in footnote 3:

> "3. The Board previously has assessed Riffin's claim that NSR failed to serve him and has determined that Riffin is not a shipper on the CIT. *Maryland Transit Administration – Petition for Declaratory Order,* STB Finance Docket No. 34975 (STB served Sept. 19, 2008). Riffin's restatement of the same allegations here does not warrant revisiting that determination."

24. **Rebuttal:** The Board based its conclusion that Riffin is not a **current or potential** shipper on the CIT upon its **September 19, 2008** decision in *Maryland Transit Administration – Petition for Declaratory Order*, STB Finance Docket No. 34975, fn 19, Op. at 9. This conclusion was based on two statements made by Robert L. Williams on **April 11, 2007.** [¶¶ 7, 13 of Williams' April 11, 2007 Verified Statement (MTA's Exhibit 1)]. Mr. Williams testified that (¶7): "The line had been abandoned just to the north of that overpass ... Segments of the track north of there had been removed prior to MTA's acquisition [of the Line]. The connection between the old rail line and the property now owned by James Riffin and alleged to be owned by Mark Downs has been gone since the 1940's." ¶13: "As of the MTA's acquisition of the CIT in 1990, no active shippers existed north of York Road in Cockeysville and tracks north of York Road had been removed."

25. In STB Docket No. AB-103 (Sub No. 21X), *The Kansas City Southern Railway Company – Abandonment Exemption – Line in Warren County, MS, In the Matter of a Request to*

Set Terms and Conditions, Served February 22, 2008, on p.9, the Board stated:

> "... a carrier may remove track, as long as no shipper seeks service and as long as the carrier is prepared to restore the track should it receive a request for service."

26. The fact that the tracks north of York Road (north of MP 14.0) were removed, is of no import, since "... a carrier may remove track, as long as no shipper seeks service and as long as the carrier is prepared to restore the track should it receive a request for service."

27. **Contrary** to Mr. Williams's statement that the "line had been abandoned just to the north of that overpass," [York Road overpass at MP 14.85 according to Mr. Williams Exhibit C-5] the line in fact **has not been abandoned** "north of that overpass." According to NSR's December 16, 2009 *Petition for Exemption*, STB Docket No. AB-290 (Sub-No. 311X) (***"NSR Petition"***), the Line extends to **Milepost UU 15.44,** which according to Mr. Williams Exhibit C-5, is some 0.59 miles (3,115 feet) **north of the York Road overpass.** [A copy of Mr. Williams Exhibit C-5 was appended as Riffin's Exhibit 3-A to *James Riffin – §10902 Acquisition and Operation Application – Veneer Spur – In Baltimore County, MD*, filed May 6, 2009 (***"Riffin §10902 Application"***)].

28. On **April 11, 2007,** the date of Mr. Williams Verified Statement, Riffin **did not own the Veneer Spur.** Riffin's **Barrel Warehouse** property at 10919 York Road, is not immediately adjacent to the CIT. [As the Board has pointed out, Riffin's Barrel Warehouse property is about 200 feet north of the CIT right-of-way.] Consequently, the Board's September, 2008 conclusion that Riffin was not a shipper on the CIT in **2007,** had some basis (**if** one must own property immediately adjacent to a railroad right-of-way in order to be a shipper).

29. However, on **February 16, 2009** Riffin acquired the Veneer Spur, and on **May 6, 2009** filed a *§10902 Acquisition and Operation Application*, wherein he gave **sworn testimony** that **Riffin** wanted rail service in Cockeysville, and **sworn testimony** that a number of other businesses in Cockeysville wanted rail service, and would utilize Riffin's Veneer Spur to transload goods to / from railcars. When Riffin acquired the Veneer Spur, he became a *bona fide*

shipper on the Line, and but for NSR's refusal to provide service, would have already received goods via rail on his Veneer Spur.

30. Included in the shipper's letters of support to be filed by Ms. Lowe, is James Riffin's April 10, 2010 sworn affidavit stating that he wants rail service in Cockeysville. It was arbitrary, capricious, unreasonable and material error for the STB to rely upon 3-year-old statements by Robert Williams, and to **exclude** more recent **material** information, to conclude that Riffin is not a **potential** shipper on the CIT, particularly in light of Riffin's **February 16, 2009** acquisition of the Veneer Spur, and Riffin's **May 6, 2009 Application** to acquire and operate the Veneer Spur as an additional line of railroad, and to provide freight rail service not only to Riffin, but to other Cockeysville shippers.

31. It should be born in mind that the criteria for granting an OFA is a **potential** for continued rail service, as manifested by interest from **potential** shippers. The statute **does not** limit shipper interest only to **existing** shippers. By ruling as it did (holding that Riffin is not an **existing** shipper), and totally ignoring the overwhelming evidence that Riffin is a **potential** shipper, the STB has committed material error. In addition, on p. 5 of its May 2, 2008 decision in *James Riffin – Petition for Declaratory Order*, STB Finance Docket No. 34997, the STB stated:

> "Even if petitioner [Riffin] were to ship his MOW equipment and materials by rail over the CIT to a rail line that he owns or operates, petitioner would have to arrange transportation with another rail carrier. In that situation, **petitioner would likely be no more than a shipper on the CIT.**" (Emphasis added.)

32. This May 2, 2008 decision by the STB clearly states that if Riffin were to attempt to ship his MOW equipment via rail to Allegany County, Maryland, **he would be a shipper on the CIT.**

33. It should be pointed out that:

a. The Board **has not ruled** on Riffin's *§10902 Acquisition and Operation Application*

(it is being held in abeyance until the U.S. Court of Appeals, District of Columbia Circuit, Docket No. 09-1277, rules on Riffin's Petition for Review of the Board's September 15, 2009 decision in *James Riffin – Petition for Declaratory Order*, STB Finance Docket No. 35245 (wherein the Board held Riffin was not a common carrier on his Allegany County line due to a lack of "suitable legal interest").

b. Riffin filed his Petitioner's Brief in CADC No. 09-1277 on **April 14, 2010**, wherein he cited case authority holding that Riffin **does have** a "suitable legal interest" in his Allegany County line to be the common carrier on that line.

c. In his *§10902 Acquisition and Operation Application*, Riffin provided sworn testimony regarding potential traffic on the Line and provided letters from Cockeysville shippers who have an interest in rail service.

d. Riffin **has** "taken the basic step of contacting the carrier about rates and terms of service ... [and] demonstrated that the traffic would be likely in the coming year." *Union Pacific Railroad Company – Discontinuance – in Utah County, Utah*, STB Docket No. AB-33 (Sub-No. 209) slip op. at 2-3 (STB served Jan. 2, 2008). Riffin has not only determined 'rates and terms of service,' he has **actually paid to have rail cars shipped to Cockeysville** (all of which NSR refused to deliver to Cockeysville).

NSR HAS FAILED TO IDENTIFY PRECISELY WHERE THE ABANDONMENT ENDS

34. On page 6 of its Petition for Exemption, NSR states:

"The Line is located between railroad milepost UU-1.00 (located just north of Wyman Park Drive, formerly Cedar Avenue) and the end of the CIT line south of the bridge at railroad milepost UU-15.44."

35. The statements "just north of Wyman Park Drive" and "south of the bridge at railroad milepost UU 15.44" are very imprecise. NSR and the MTA equivocate: In its Petition, NSR said the Line ends at MP 15.44, even though it also said in its footnote 11, that the Final System Plan only conveyed to MP 15.4. The MTA said in its April 26, 2010 Reply to Riffin's Petition for Stay, that the Line ends at MP 15.4, which is what the Final System Plan states. The MTA further stated in its April 26 Reply at p.4:

> "Neither that deed nor any other evidence offered by Riffin specifies that 'Bridge No. 16' means 'the bridge at MP 15.96.' "

36. The U.S. Court of Appeals, District of Columbia Circuit, recently stated in *Consolidated Rail Corp. v. STB*, 571 F.3d 13 (D.C. Cir. 2009), that where the Board's authority was challenged and an interpretation of the Final System Plan or the Special Court's conveyance order under 45 U.S.C. 719(e)(2) was required, the Board lacked jurisdiction to resolve the question of the nature of the trackage sought to be abandoned.

37. In this proceeding, NSR has failed to identify precisely where the Line it proposes to abandon is located, and has failed to precisely indicate the scope of the conveyance to Conrail pursuant to the Final System Plan. NSR states in its Petition that it seeks to abandon to a point "south of the bridge at railroad milepost UU-15.44." Petition at 6. How far south of the "bridge at milepost UU -15.44" is not specified. NSR does not indicate where the "Bridge at milepost UU 15.44" is located.

38. The Final System Plan said it was transferring to Conrail only to MP 15.4. Where MP 15.4 is actually located, is unknown at this time. The "Out of Service" notes [p.505, FSP Vol. II] provided by the MTA note: "Hyde, Pa (Milepost 54.6) to Cockeysville, Md (Milepost 15.4). Damaged by 'Agnes.' " The Bridge over Beaver Dam Run was washed out by Hurricane Agnes on June 23, 1972. Consequently, service north of this bridge was no longer possible after June 23, 1972. The bridge over Western Run, which is about 1,500 feet north of Beaver Dam Run, was not damaged by Hurricane Agnes. Today it is still intact, and with the addition of a new set of railroad ties, would be fully functional. Western Run is just a few hundred feet south

of the former Ashland Station. The Cockeysville Station was located a few hundred feet north of York Road, or about 1,000 feet from the Beaver Dam Run bridge that Agnes washed out. Had the 'Out of Service' note been referring to Western Run, it would have said to Ashland, at MP 16, rather than to Cockeysville, at MP 15.4. Since the Western Run bridge was not damaged by Agnes, while the Beaver Dam Run bridge was totally obliterated by Agnes, the "Damaged by 'Agnes' " note was probably referring to the Beaver Dam Run bridge. Since the purpose of the Final System Plan was to retain those portions of line that were capable of being served by rail on July 26, 1975, and since that portion of the CIT that was located north of Beaver Dam Run was incapable of being served by rail on July 26, 1975 (due to the obliteration of the Beaver Dam Run bridge), it is more probable that the intent was to convey to Conrail only to the south side of Beaver Dam Run, rather than to the south side of Western Run.

39. The MTA's deed says Conrail conveyed to "the southerly line of Bridge No. 16." In its April 26 Reply, the MTA says Bridge 16 **is not** located at MP 15.96. Mr. Williams' Exhibit C-5, shows a bridge at mileposts 14.85 (York Road), 15.05, 15.16, 15.44, 15.96 and 16.18. So which bridge is "Bridge 16?" Besides, if Bridge 16 is located north of MP 15.4, as NSR stated on p.19 of its April 23 Response, "it was not subsequently conveyed to MTA by Conrail."

40. All of this leads to the conclusion that "an interpretation of the Final System Plan" **is required** to determine the extent of "the Special Court's conveyance order under 45 U.S.C. 719(e)(2)." This determination can only be made by the Special Court. Consequently, the STB is required to either reopen, then reject NSR's Petition, or hold this proceeding in abeyance while the Special Court determines precisely what was conveyed to Conrail by the Final System Plan. See *Consolidated Rail Corporation – Abandonment Exemption – In Hudson County, NJ*, STB Docket No. AB-167 (sub-No. 1189X), served April 20, 2010.

STRANDED SEGMENT: COCKEYSVILLE INDUSTRIAL PARK TRACK
AKA: HUNT VALLEY INDUSTRIAL TRACK

41. On p.6 of NSR's Petition, in footnote 5, NSR states that it intends to abandon the Cockeysville Industrial Park Track ("**CIPT**"), which connects to the CIT near MP 13.0. This line of railroad was acquired by the MTA on **April 25, 1997**. It would be a line of railroad, since it served at least five shippers. [Riffin knows of at least five shippers: McCormick Spices, a freight forwarder, the Stenersen Warehouse, the Michel Warehouse and Noxel.] At the time the MTA acquired the CIPT, it was a common carrier by rail, having acquired a portion of the Baltimore and Annapolis railroad in 1991. When, on **August 9, 2001**, the MTA filed to abandon its Baltimore and Annapolis rail line, it made the following statements:

> "MTA and Canton are common carriers by railroad subject to 49 U.S.C. Subtitle IV, Chapter 105." See AB 590 (Sub-No. X).
>
> "MTA acquired this portion of the Line from the B&A Railroad company in 1991 ... ." P.7, Exhibit E, Historic Report, AB 590 (Sub-No.X).

42. Since the MTA was a rail carrier when it acquired the CIPT in 1997, it needed authority to acquire this additional line of railroad. The MTA never sought nor received authority to acquire this additional line of railroad. When the MTA filed its *Petition for Declaratory Order* on December 22, 2006, STB Finance Docket No. 34975, it only asked the STB to confirm that the MTA's 1990 acquisition of the CIT did not require agency approval under 49 U.S.C. 10901. The MTA **has never sought approval, nor exemption from 49 U.S.C. 10902, to acquire the CIPT.** The STB's October 9, 2007 Order solely held that the MTA's 1990 acquisition of the CIT did not need prior Commission authority.

43. The MTA became a common carrier in 1991 when it acquired a portion of the B&A rail line. The MTA never sought nor received an exemption from the requirements of 49 U.S.C. 10902 to acquired an additional line of railroad (the CIPT, acquired in 1997). Since as a general rule, a person, including a state agency, that acquires an active rail line assumes a common carrier obligation to provide rail service on the line following the change in ownership, unless and until the MTA obtains an exemption from the dictates of 49 U.S.C. 10902, it has a common carrier obligation with regard to the CIPT. If NSR is permitted to abandon the CIT, the CIPT will no longer be connected to the national rail system. While NSR will have been granted

authority to abandon its operating rights and common carrier obligations on the CIPT, the MTA will still have residual common carrier obligations on the CIPT. Consequently, **the CIPT will become a stranded segment.**

44. In *Futurex Industries, Inc. v. I.C.C.,* 897 F.2d 866 at 870-873 (7th Cir. 1990), the court stated:

> "We must, of course, be vigilant to detect and restrain the latter phenomenon [segmentation of a line] should it appear." Quoted in *Caddo Antoine and Little Missouri R. Co. v. U.S.,* 95 F.3d 740 at 748 (8th Cir. 1996).

THE STB'S APRIL 5 DECISION IS NOT SUPPORTED BY 'SUBSTANTIAL EVIDENCE'

45. The Board's decision granting NSR's request to exempt the proceeding from the OFA procedures was based on the following conclusions, **none of which are supported by 'substantial evidence'**:

A. Riffin is not a shipper on the Line. Op. at 4.

B. **Rebuttal:** See ¶¶ 23 to 33, *supra.*

C. "Riffin's forecasts for potential freight rail traffic are too speculative to be given any significant weight. ... [Riffin] failed to submit any verified statements or other evidence from shippers requesting freight rail service." Op. at 4.

D. **Rebuttal:** The Motion for Protective Order in *Riffin's §10902 Application,* contains Riffin's May 6, 2009 **six-page VERIFIED STATEMENT, and contains LETTERS from Cockeysville shippers stating that they have an interest in using rail service, if only it were available.**

E. "[N]o potential shippers have objected to the exemption from the OFA process." Op. at 8.

F. **Rebuttal:** Ms. Lowe has submitted 8 verified letters from shippers who have objected to the exemption from the OFA procedures and who have expressed a desire for freight rail service on the CIT. These are known shippers with known shipping / transportation requirements, who presently use trucks, but would prefer to use rail, since their goods originate many thousands of miles from Cockeysville, and since as the STB has previously pointed out, it is more economical to move goods via rail than via truck, particularly when the goods must be moved thousands of miles.

THE MTA PLEADINGS DO NOT CONSTITUTE 'SUBSTANTIAL EVIDENCE'

46. The MTA "asserted the abandonment of freight rail service is critical to ensuring the future safety and success of the light rail transit system MTA operates over the Line." Op. at 6. The STB stated that "the safety of the continued use of the tracks ... [was] an important consideration here." Op. at 7.

47. **Rebuttal:** The above statement was made by **counsel** for the MTA. The statement was hearsay (which is admittable), but **does not** constitute 'substantial evidence,' since it **was not** supported by a sworn (or even an unsworn) statement by a MTA employee. "[U]nsworn hearsay, ... even when admitted in a nonjudicial hearing is of a low order of probative value." *Jackson v. U.S.*, 428 F.2d 844, 847 (Court of Claims, 1970). "However, mere hearsay lacking sufficient assurance of its truthfulness is not substantial evidence to overcome the sworn testimony of a claimant." *McKee v. U.S.*, 500 F.2d 525, 528 (Court of Claims, 1974). Sworn statements are "entitled to some consideration, although its weight is necessarily impaired by the fact that the affiant could not be presented for cross-examination, and, therefore, there has been no opportunity to determine his credibility." *U.S. v. I.N.S*, 499 F.2d 918, 921-922 (9th Cir. 1974). Hearsay evidence, "while admissible, could not form the sole basis of a decision." *Clearfield Cheese Co., v. U.S.*, 308 F.Supp. 1072, 1076 (W.D.Mo., 1969). "Where there is evidence pro

and con, the agency must weigh it and decide in accordance with the preponderance." *Steadman v. SEC*, 450 U.S. 91, 101, 101 S.Ct. 999, 1007, 67 L.Ed.2d 69 (1981). "Mere uncorroborated hearsay or rumor does not constitute substantial evidence." *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 230, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938).

48. The MTA, in its April 26, 2010 Reply, made the following argument:

> "The Board's rules specifically permit it to rely on pleadings signed by counsel. 49 C.F.R. §1104.4(a)."

49. 49 CFR 1104.4(a) states:

> (a) *Signature of attorney or practitioner.* If a party is represented by a practitioner or an attorney, the original of each paper filed should be signed in ink by the practitioner or attorney, whose address should be stated. The signature of a practitioner or attorney constitutes a certification that the representative:
>
> (1) Has read the pleading, document or paper;
> (2) Is authorized to file it;
> (3) Believes that there is good ground for the document;
> (4) Has not interposed the document for delay;
>
> A pleading, document or paper thus signed need not be verified or accompanied by affidavit **unless required elsewhere in these rules.** (Emphasis added.)

50. 49 CFR 1104.4(a) clearly states that an attorney's signature on a document merely means that (1) he has read it; (2) he is authorized to file it; (3) he believes there is good ground to file the document; and (4) it is not interposed for delay. This is quite similar to FRCP Rule 11 (b). What counsel for the MTA overlooks is the end of the next sentence: "A pleading ... need not be verified ... unless required elsewhere in these rules."

51. All proceedings before the STB are subject to the Administrative Procedures Act, 5 U.S.C., and in particular to 5 U.S.C. 556 (d). The statements made by the MTA's counsel are hearsay. Hearsay is admittable. However, as discussed in ¶ 47 above, unsworn statements do not constitute 'substantial evidence' when challenged, nor may unsworn statements form the sole basis for a decision. The signature of Counsel for the MTA on the pleading does not magically

convert unsworn hearsay into sworn testimony. If the MTA's argument were to be adopted by the STB, then there would no longer be any need for any party represented by counsel to ever submit a verified statement. Counsel could throw out 'facts' obtained from unknown, unidentified persons or sources, then argue they were 'sworn' testimony, merely because counsel signed the pleading. Allowing this would deny the other party their Due Process Right to confront and question persons making 'factual' allegations. There would be no way to test the reliability or credibility of the 'witness.' The attorney, in effect, would become the 'witness,' and as such, would be subject to cross examination under oath. As the cases cited in ¶47 clearly state, representations made by counsel, even though unsupported by sworn testimony, are admittable, but do not constitute 'substantial evidence' when challenged or uncorroborated.

52. The MTA's counsel's representations that "NSR's requested abandonment, and the associated exemptions, are critical to ensure the future safety and success of the light rail transit system MTA operates over the Line," MTA January 25, 2010 Reply, p. 2, are unsupported by any sworn statements, and are **devoid of any particularity** as to **how** or **why**, or **in what way** continued use of the CIT for freight rail purposes during those hours when the **MTA is not using the CIT** for light rail purposes, may somehow adversely affect "the safety and success of the light rail system." Not only has Riffin challenged this bald, unsupported, undocumented statement, but the MTA's own statement regarding the effect of double-tracking the entire CIT, conflicts with this statement. [The CIT was double-tracked to "(1) **increase capacity** on the Line for light rail traffic and (2) **reduce actual and potential temporal conflicts** between freight traffic and light rail traffic." MTA January 25 Reply at 3.] And as Riffin pointed out in his Comments, the MTA has never filed any complaints regarding safety issues associated with Conrail's, or NSR's use of the Line for freight purposes **for more than 15 years!** If there were no safety or capacity issues due to freight use of the Line for 15 years when the Line was single-tracked, when the Line was double-tracked in 2005, the potential for a safety issue was lowered to an even lower probability. Ultimately, the 'safety issue' becomes just a ruse: Since the MTA and NSR have separate exclusive operating windows, they never occupy the Line at the same time. Since freight use of the Line only occurs when the MTA is not using the Line, there can be no 'conflict' between light rail's use of the Line, and the freight carrier's use of the Line.

EXEMPTING THE PROCEEDING FROM THE OFA PROCEDURES WAS CONTRARY TO LAW

53. Appellant would argue that when the Board granted NSR an exemption from the 49 U.S.C. 10904 OFA procedures, it acted arbitrarily and capriciously, for in granting the exemption, the Board reversed its position in the face of precedent it failed to persuasively distinguish, and the exemption contravenes Congress' clearly stated legislative intent that rail service be preserved whenever possible. See *Norfolk Southern Railway Company – Adverse Abandonment – St. Joseph County, IN*, STB Docket No. AB-290 (Sub-No. 286), Served February 13, 2008 (***"Notre Dame"***), wherein the STB denied an abandonment application even though there had been no traffic on the line for the previous 10 years, the University of Notre Dame had stated that it did not want to use the line, and the line was needed for a public purpose (a sewer line).

54. Granting an exemption from 49 U.S.C. 10904 is an "unusual relief," **rarely granted.** From 1980 through 1996, the ICC granted an exemption from offers of financial assistance only 5 times. The Board has likewise granted this exemption only rarely. "In the past, the Commission has granted this unusual relief when the right-of-way is needed for a valid public purpose and there is no overriding public need for continued rail service." *Southern Pacific Transportation Company – Discontinuance of Service Exemption – In Los Angeles County, CA*, Docket No. AB-12 (Sub-No. 172X), decided December 1, 1994, ("SP 172X") at page 3.

55. In *Norfolk Southern Railway Company - Abandonment Exemption - In Orange County, NY*, FD No. AB-290 (Sub-No. 283X) (*"Orange County"),* the carrier asked to be exempt from the OFA process. Petitioner Riffin filed a Notice of Intent to File an Offer of Financial Assistance to purchase the line, and strongly objected to NS' request to be exempt from the OFA process. In that proceeding, the Board denied the carrier's request to be exempt from the OFA process. The Board justified its decision as follows:

"The OFA provisions - which permit a party genuinely interested in providing continued rail service to acquire a line for that purpose over the objections of the owner - reflect a Congressional intent that rail service be preserved whenever possible. While exemptions from 49 U.S.C. 10904 have been granted from time to time, they have been granted when the right-of-way is needed for an overriding public purpose (footnote 3) or an important private undertaking (footnote 4), and there is no apparent interest in continued rail service (footnote 5). ... Mr Riffin has shown an interest in providing continued rail service, despite the absence of an active shipper on the line for almost 2 years. Accordingly, the Board finds no basis for undercutting the Congressional objective of maintaining rail service, despite the fact that the prospects for a successful OFA are marginal." [2]

56. In *1411 Corporation – Abandonment Exemption – In Lancaster County, Pa,* Docket No. AB 581 (Sub No. 0X), Served April 12, 2002, an entity called Shawnee desired to acquire the right-of-way that was the subject of the abandonment proceeding, to be used as a rail trail. The carrier, Middletown & Hummelstown Railroad Company, supported Shawnee's desire to exempt the proceeding from the OFA provisions of 49 U.S.C. §10904. Shawnee argued that an overriding public interest [the nearby city of Columbia's Master Plan proposed that the line be converted into a recreational and scenic trail] required the STB to set aside the OFA process in that case. In denying the OFA exemption request, the STB stated:

"But it is well settled that an OFA should take priority over a trail use proposal because of the strong Congressional intent to preserve rail service wherever possible. Footnote 14: *See* 49 CFR 1152.29(d) (trail use is provided for only if "continued rail service does not occur under 49 U.S.C. 10904. ...") *See also Rail Abandonments - Use of Right-of-Way As Trails,* 2 I.C.C.2d 591, 608 (1986) ("**Offers of financial assistance to acquire rail lines or subsidize rail operations under section 10905 [now 10904] take priority over BOTH interim trail use AND PUBLIC USE CONDITIONS because retention of existing rail service is mandatory under section 10905 ...**"). Indeed, even under the Trails Act, trail use is interim and always subject to restoration of rail service over the line. 49 CFR 1152.29(a)(3)." (Emphasis added.)

57. In the very few cases where exemption from offers of financial assistance have been granted, the STB and the ICC have enumerated criteria which justify granting this exemption:

A. In *Iowa Northern Railway Co. – Abandonment - In Blackhawk County,*

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[2] After the STB rendered this decision, NSR withdrew its petition for abandonment, thereby thwarting Riffin's efforts to acquire this line.

IA, Docket No. AB-284 (Sub-No. 1X), decided March 28, 1988, the line to be abandoned was to be used as the corridor for a new U.S. highway 218.

B. In *Chicago and North Western Transportation Company – Abandonment Exemption – In Blackhawk County, IA,* Docket No. AB-1 (Sub-No. 1X), decided July 7, 1989, the railroad asked for abandonment approval so that the right-of-way could be used for another portion of the proposed U.S. highway 218, see *Iowa Northern, supra.*

C. In *Missouri Pacific Railroad Company – Abandonment – In Harris County, TX,* Docket No. AB-3 (Sub-No. 105X), decided December 16, 1992, the line to be abandoned was to be used as the corridor for an expanded Interstate Highway 10, and as the corridor for future mass transit.

D. In the *SP 172X* case, ¶ 54, *supra,* the only shipper on the line had stopped using the line prior to SP filing its Discontinuance of Service exemption.

E. In *Missouri Pacific Railroad Company – Abandonment – In Harris County, TX,* Docket No. AB-3 (Sub-No. 139X), decided December 23, 1996, the railroad wanted to abandon a 0.52 mile segment. The only shipper on the line had two means of rail access.

F. In *The Cincinnati, New Orleans & Texas Pacific Railway Co. – Abandonment Exemption – in Cumberland and Roane Counties, TN,* STB Docket No. AB-290 (Sub-No. 208X), decided November 13, 2000, (*"Cincinnati, New Orleans")* the railroad wanted to abandon a 15.4 mile segment of a dead-end branch line that served only one shipper.

G. In *Central Michigan Railway Company - Abandonment Exemption - in Saginaw County, MI,* STB Docket No. AB-308 (Sub-No. 3X), served October 31, 2003, the STB exempted the abandonment from the OFA process so that an interstate highway could be widened.

H. In *CSX Transportation, Inc. - Abandonment - in Barbour, Randolph, Pocahontas, and Webster Counties, WV,* STB Docket No. AB-55 (Sub-No. 500) served January 9, 1997, the STB had been **ordered** by the D.C. Circuit Court of Appeals, to grant the abandonment petition.

58. In those few cases where the STB has granted a request to be exempt from the OFA process, no one has filed a notice indicating that they had a desire to purchase the line via the OFA process (or if an OFA was filed, it was subsequently withdrawn due to the offeror receiving substantial financial incentives to withdraw the OFA.). In addition, the public-use project was so massive, the right-of-way was too small to accommodate both the public-use project (typically a highway), and a line of railroad.

59. The following common criteria existed in the cases where exemption from the OFA regulations was granted:

A. After abandonment, the shippers still had access to rail service via an adjacent line.
B. No one opposed the abandonment or OFA exemption requests.
C. No one filed a Notice of Intent to File An Offer of Financial Assistance.
D. Delaying approval of the abandonment petition, while the statutory period for filing an OFA lapsed, would have delayed an important public or private undertaking.
E. Continuing to use the line proposed for abandonment, for freight rail service, **would have precluded** using the line for an important public or private undertaking.

60. In the instant case, **none** of the criteria enumerated in the cases that granted exemption from the OFA regulations, exists. After abandonment, the shippers **would not** have access to an adjacent rail line. Eight potential shippers have opposed abandonment of the Line. Three potential CIT shippers filed a Notice of Intent to File an OFA (Riffin, Rudo, Lowe).

Delaying approval of the abandonment petition, while the statutory period for filing an OFA lapsed, **would not** have delayed an important public project. (The light rail line has been in operation for more than 20 years. Neither NSR nor the MTA have identified an 'important public project' that will be delayed by allowing the OFA process to proceed.) Continuing to use the line for freight service, **would not have precluded** using the Line for an important public project (light rail).

UTAH COUNTY, UTAH CASE

61. The STB cited *Union Pacific Railroad Company – Discontinuance – in Utah County, Utah*, STB Docket No. AB-33 (Sub-No. 209, Served Jan. 2, 2008, in support of its holding that Riffin's evidence of potential traffic was insufficient. Slip op. at 4. This case is easily distinguished from this proceeding. The *Utah* case involved the **discontinuance** of rail service, rather than the **total abandonment** of rail service. In the *Utah* case, the carrier, Union Pacific, explicitly stated that if sufficient traffic were to develop at some future date, it would reinstate rail service. In this proceeding, once the abandonment and OFA exemption are granted, there will be no rail service, regardless of how much traffic may arise. In the *Utah* case, no shipper offered to purchase the line, nor did any shipper offer to subsidize the cost of providing service on the line. In the *Utah* case, the cost to rehabilitate the line was substantial (multi-millions). In this proceeding, NSR has stated "that only minor rehabilitation of the Line and restoration and reconnection of switches would be required to perform freight service over the Line." Petition at 30. In the *Utah* case, the only shipper who objected to the loss of rail service, had a heavy burden of persuasion, since the shipper had to demonstrate that it would generate sufficient traffic so that Union Pacific could recoup the cost of rehabilitating the line and maintaining the line. In this proceeding, NSR **will incur no cost if the OFA procedures are not exempted.**

62. NSR has the burden of persuading the STB that it should be relieved of its common carrier obligations with regard to the CIT. This was an easy burden, since no one objects to NSR being relieved of its CIT common carrier obligations.

63. NSR has the burden of proving by a preponderance of the evidence, that there is no

potential for continued rail service, in order to be granted an exemption from the OFA procedures. The absence of any rail traffic on the Line for the past five years is not due to an absence of demand for service. For the first three years, the absence of freight rail traffic was due to the Line being **out of service** due to the MTA's double-tracking project. The absence of freight rail service for the past two years has been due to NSR's **adamant refusal to provide rail service!** Riffin has not only demanded rail service, he has **paid** for rail service that was never provided. Riffin has repeatedly asked the STB to compel NSR to provide him with rail service. The STB has steadfastly refused to order NSR to provide rail service on the CIT.

64. The three existing shippers are contractually bound not to ask for rail service.

65. The STB has been provided with verified letters from eight shippers who have stated that they would use freight rail service, **if it was offered.** The amount of potential traffic is significant: 260 rail cars per year. 49 U.S.C. 10904 only requires a showing of some potential traffic. Riffin has demonstrated by a preponderance of the evidence that there is a **strong potential** for continued rail service: **8** potential shippers who want rail service **vs. three** shippers who do not want rail service; 8 potential shippers who are willing to ship **260** rail cars per year **vs.** 3 former shippers who shipped **less than 200** rail cars per year.

66. An exemption may only be granted if continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101. In its April 5 decision the STB said exempting the proceeding from the OFA procedures would:

A. Reduce regulatory barriers to exit. **Rebuttal:** The OFA procedures are not an impediment to a carrier being relieved of its common carrier obligations. The OFA procedures actually **facilitate** the existing carrier's exit, since the existing carrier is not obligated to produce evidence that the line is no longer needed for continued rail service. When someone makes an OFA to purchase a line, the existing carrier will automatically be relieved of its common carrier obligations, without any effort on its part. Furthermore, by making an OFA, the offeror **relieves** the carrier of its obligation to abandon the line (remove the old ties, remove and scrap the rail

infrastructure, find a buyer for any usable scrap material), thereby **facilitating rather than hindering** exit from the industry.

B. Expedite the regulatory decision. **Rebuttal:** Had NSR not requested an OFA exemption, the regulatory decision would have been expedited. By requesting an exemption from the OFA procedures, NSR has actually **impeded and prolonged** the regulatory decision.

C. No abuse of market power. **Rebuttal:** Contrary to the STB's finding, **eight** potential shippers have objected to the exemption from the OFA process.

67. In its April 5 decision, the STB **totally ignored** 49 U.S.C. 10101 **(4)** [to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense]; **(5)** [to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes]; **(7)** [to reduce regulatory barriers to entry into ... the industry]; **(14)** [to encourage and promote energy conservation]; and **(15)** [to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.].

68. There were sufficient grounds to grant NSR an exemption from the full requirements of 49 U.S.C. 10903.

69. NSR failed to prove by a preponderance of the evidence that it met the criteria for exempting the proceeding from the OFA procedures. NSR failed to show that exempting the proceeding from the OFA procedures would not adversely affect any §10101 rail transportation policy. On the contrary, exempting the proceeding from the OFA procedures adversely affected **five** §10101 rail transportation policies.

NO POST ENVIRONMENTAL ASSESSMENT WAS EVER ISSUED

70. In its Arpil 5 decision on p.9, the STB stated that the SEA issued a Post EA addressing Riffin's comments on March 18, 2010. Riffin, Rudo, Lowe, Delmont and Strohmeyer did not receive a copy of this alleged Post EA. No Post EA appears on the STB's web site. It was material error for the STB to issue its decision without making public this Post EA.

CONCLUSION

71. WHEREFORE for the foregoing reasons, Riffin would ask that:

A. The STB reopen the proceeding;

B. The STB **either**:

a. Reject NSR's Petition for Exemption (with leave to refile at some future date when the issues identified have been resolved);

b. **Or** refer the matter to the Special Court for a determination by that Court of the extent of the conveyance to Conrail by the Final System Plan;

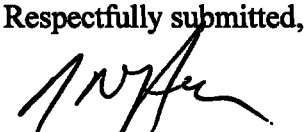
C. Stay, or hold the proceeding in abeyance, if the matter is referred to the Special Court, or, if the STB denies this Petition to Reopen, stay the exemptions until judicial review of the STB's decision has been completed;

D. And for such other and further relief as would be appropriate.

72. I hereby certify under the penalties of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on April 19, 2010

Respectfully submitted,



James Riffin
1941 Greenspring Drive
Timonium, MD 21093
(443) 414-6210

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2010, a copy of the foregoing Petition to Reopen, was served by first class mail, postage prepaid, upon James R. Paschall, Senior General Attorney, Norfolk Southern Corporation, Law Department, Three Commercial Place, Norfolk, VA 23510-9241, Charles Spitulnik, Kaplan Kirsch, Ste 800, 1001 Connecticut Ave NW, Washington, DC 20036, and was hand delivered to Zandra Rudo, Lois Lowe and Carl Delmont and was served via e-mail upon Eric Strohmeyer.

James Riffin

COCKEYSVILLE RAIL LINE SHIPPERS COALITION

13 Beaver Run Lane
Cockeysville, MD 21030

(443) 226-5077

February 22, 2006

Vernon Williams, Secretary
Surface Transportation Board
1925 K Street NW 20423-0001

RE: STB Docket No. AB 290-237X
Petition for Exemption; Norfolk Southern Railway Company;
Cockeysville Line, Baltimore City and County, Maryland

Dear Secretary Williams:

Attached are five letters, along with ten copies of each letter, from prospective shippers whose businesses are located on or near the Cockeysville rail line, which rail line is the subject of Norfolk Southern Railway Company's Petition for Exemption, Abandonment of Freight Operating Rights and of Rail Freight Service. The authors of the letters object to the loss of rail freight service on the Cockeysville rail line, support Mr. James Riffin's offer to purchase the rail line from Norfolk Southern, and indicate that the prospective shippers would utilize the rail line to ship products via rail, providing shipment via rail was less expensive than shipment of their products via truck.

On February 3, 2006, two of the letters (Mark Downs, Packard Fence) were filed with the Board. Since neither of these two letters have appeared on the Board's web site for this case, copies of the letters previously filed with the Board, are being filed a second time.

Sincerely,

Lois Lowe

Lois Lowe
Executive Secretary